80-740

Supreme Court, U. S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

.....Term, 19.....

No.

JAMES DONALD ECKMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANLEY W. GREENFIELD, Esquire
GREENFIELD & MURTAGH

Counsel for Petitioner

728 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 261-4466

QUESTIONS PRESENTED FOR REVIEW

I. Did the Trial Court err by denying Petitioner and his counsel the right to be present and make argument at an *in camera*, *ex parte* conference between government counsel and the trial judge at which the government presented reasons why an informant's last known address should not be provided to the Petitioner.

II. Did the Trial Court err in refusing to order the government to disclose to Petitioner the last known address of a known and identified government informant who was not in protective custody and who was an alleged co-participant in the crimes charged.

III. Did the Trial Court err in denying Petitioner's Motion to Suppress evidence seized without a warrant from a duffel bag in which the Petitioner had a legitimate expectation of privacy.

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled United States of America v. James Donald Eckman, at No. 79-2834. The Petitioner's co-defendants below filed separate appeals denominated as United States of America v. Howard Gregory Blum, No. 79-2071, and United States of America v. Peter J. Machi, No. 79-2702.

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The United States Court of Appeals for the Third Circuit issued a Judgment Order on August 4, 1980. This Order is contained in the Appendix at pp. 1a-3a.

The United States Court of Appeals for the Third Circuit also issued an Order dated September 10, 1980 denying Petitioner's Petition for Rehearing. This Order is contained in the Appendix at pp. 4a-5a.

STATEMENT OF JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered by the Court, per Aldisert, J., on August 4, 1980.

The Petitioner timely filed a Petition for Rehearing before the said Court, which Petition was denied by the Court, per Aldisert, J., in an Order entered on September 10, 1980.

The statutory provision which the Petitioner believes confers jurisdiction on this Honorable Court to review the judgment in question by Writ of Certiorari is Title 28 United States Code §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of

War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 United States Code, Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 United States Code, Section 2113(b) provides:

> Whoever takes and carries away, with intent to steal or purloin any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 United States Code, Section 924(c) provides:

> Whoever--
>
> (1) uses a firearm to commit any felony for which

he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

STATEMENT OF THE CASE

Petitioner, JAMES DONALD ECKMAN, and three co-defendants, were indicted in a four count indictment returned in the United States District Court for the Western District of Pennsylvania at Criminal No. 79-138. The Petitioner and his three co-defendants, Howard Blum, Peter Machi and Aedan Charles McCarthy, were all named in Counts I and II of the indictment charging a conspiracy to steal money from an armored car carrying bank funds. (Title 18 United States Code §§ 371 and 2113(b)) and unlawfully carrying firearms in the course of a conspiracy (Title 18 United States Code § 924(c)).

Counts III and IV charging Petitioner Eckman and co-defendant McCarthy,

respectively, with violations of Title 18 United States Code §1202(a)(1) Appendix (possession of firearms by a convicted felon) were severed prior to trial.

Co-Defendant McCarthy plead guilty prior to trial and appeared as the principal government witness against the remaining three defendants.

Petitioner's Pre-Trial Motion to Suppress certain evidence was denied. After a trial by jury, the Honorable Barron P. McCune, United States District Judge presiding, Petitioner Eckman and co-defendants Blum and Machi were found guilty on Counts I and II. Upon conviction, the three were each sentenced to a term of five years imprisonment on Count I and a consecutive term of three

years imprisonment on Count II. Petitioner's bond was revoked and he was remanded to custody.

Notice of Appeal was filed by Petitioner's trial counsel on December 14, 1979. Petitioner's current counsel entered his appearance in the United States Court of Appeals for the Third Circuit on March 20, 1980 at No. 79-2834. Co-defendants Blum and Machi filed appeals with the same Court at Numbers 79-2071 and 79-2072, respectively. On March 12, 1980 the Circuit Court ordered all three appeals consolidated for the purpose of argument and disposition.

After submission of briefs by the parties, the Court of Appeals disposed of the matter without hearing oral argument, entering a Judgment Order affirm-

ing the judgment of conviction, without opinion. This Order is set forth in the Appendix at pages 1a-3a.

Petitioner Eckman filed a Petition for Rehearing which was denied on September 10, 1980. This Order is set forth in the Appendix at pages 4a-5a.

This Petition, for a Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit, followed.

As developed at the pre-trial suppression hearing and the trial itself, the following facts of record appear.

On July 19, 1979 the Federal Bureau of Investigation received information from a confidential informant that a robbery of an armored car in the Pittsburgh, Pennsylvania area was being planned by Petitioner Eckman's co-

defendant Blum, and two men named "Pete" and "Mac", the last two of whom were from the Pittsburgh area. The informant further advised the Agent that Pete owned a 76 GMAC van; that the armored car involved made a daily run between Pittsburgh and Butler, Pennsylvania; that the robbery was planned for a Tuesday; and that the target vehicle was owned by the Cauley Armored Car Company.

Several days later on July 23, 1979, according to the testimony of an FBI Agent, the informant advised the Agent that the robbery would occur in Car Number 12 and would take place along Pennsylvania Route 8 between Pittsburgh and Butler, near an establishment known as the Valencia Lounge.

The armored car was to be robbed

while the driver and his guard were in the lounge, and that, to insure a smooth operation, the conspirators would hold some trial runs.

Surveillance on the target vehicle and the Cauley Company premises was undertaken. Contact was continued with the confidential informant. The informant advised the authorities that the robbery was planned for August 7, 1979 and further advised that on August 6, 1979 the four co-defendants had stolen two trucks from a car dealership known as German Motors, Inc., in Latrobe, Pennsylvania, a 1979 Ford Bronco, and a second, a 1979 Ford Econoline van. The fact of these thefts was verified by the FBI.

On the day of the planned robbery, August 7, 1979, Federal Bureau of Inves-

tigation maintained a surveillance at the Valencia Lounge and sighted the two stolen vehicles and Petitioner and his co-defendants. The four subjects drove to the parking lot of another nearby restaurant, some distance from the lounge where the armored car was then parked.

The federal officers made a decision to arrest the four men at that time. The four were arrested while standing together in the aforementioned restaurant parking lot. Subsequent to the arrests, the agents seized the two stolen vehicles, obtained permission from German Motors, Inc. to search them, and did in fact conduct a search. A duffel bag, which was the subject of the Petitioner's Pre-Trial Motion to Suppress, was taken from one of the

stolen vehicles and searched. No warrant was issued for this search and no consent was obtained from any of the four arrestees. Items found in the duffel bag, particularly weapons and ammunition, served as the basis for the Petitioner's conviction for Count II of the Indictment charging the carrying of a firearm in the course of the conspiracy.

At trial, co-defendant McCarthy, having previously plead to the charges, became the principal government witness and testified, in substance, that Petitioner Eckman had involved a locksmith named "Gene" in the conspiracy who had made keys to the armored car and assisted in the theft of the two vehicles from German Motors, Inc.; that the robbery of the armored car would not take place on August 7, 1979; that prior to their arrest in the parking lot, the conspirators had decided to get into

their vehicles and leave; and that no specific future plans for a robbery were made. In addition, one of the surveilling agents testified that during the course of the surveillance he recognized Robert Eugene Mercier, also known as "Gene", in the company of co-defendant Machi. This individual was not present when the four were arrested.

Counsel for the Petitioner requested that Mercier's current address be provided and the Trial Judge, at first, direct the government to do so. The government stated that it had reasons for not furnishing the address, and over the objection of defense counsel, an in camera proceeding, with a sealed record, was held.

After the ex parte, in camera hearing, the Court denied Petitioner's

request for Mercier's address.

The Petitioner was subsequently convicted as set forth above.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I. THE TRIAL COURT ERRED IN DENYING PETITIONER AND HIS COUNSEL THE RIGHT TO BE PRESENT AND MAKE ARGUMENT AT AN EX PARTE, IN CAMERA CONFERENCE BETWEEN GOVERNMENT COUNSEL AND THE TRIAL JUDGE AT WHICH THE GOVERNMENT PRESENTED REASONS WHY AN INFORMANT'S LAST KNOWN ADDRESS SHOULD NOT BE PROVIDED TO THE PETITIONER.

During the course of the Petitioner's trial it became apparent from the government's evidence that Robert Eugene Mercier, an individual identified by one of the surveilling FBI Agents and the "Gene" referred to by the testifying co-defendant McCarthy, were one and the same. This individual was therefore known to have made keys for the targeted armored car and to have participated in the theft of the two

stolen trucks utilized by the conspirators. Moreover, since this individual was never charged with the crime it is reasonable to conclude that he was the "unknown" informant who provided the wealth of detailed information to the federal authorities during the planning stages of the conspiracy. At least, he would be a valuable witness to the alleged facts testified to by McCarthy.

When the Petitioner requested that Mercier's address be provided, and the government refused, the trial judge held an ex parte, in camera conference from which Petitioner and his counsel were excluded. Petitioner has never been apprised of what transpired at that hearing, nor has his counsel, since the transcript was sealed.

This action by the trial court, sanctioned by the decision of the Court

of Appeals below, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory powers.

The ex parte, in camera conference not only deprived the Petitioner of his rights under the Fifth Amendment to the Constitution of the United States, not to be "...deprived of life, liberty or property, without due process of law;" but also denied him his rights under the Sixth Amendment to the Constitution of the United States,

> ...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Given the fact that Petitioner and his counsel were denied the right to be

present and even hear the reasons advanced by the government for refusing to provide Mercier's last known address, the Petitioner was palpably denied the effective assistance of counsel and this fact alone, we respectfully submit, requires that this Petition be granted.

II. THE TRIAL COURT ERRED IN IN REFUSING TO ORDER THE GOVERNMENT TO DISCLOSE TO PETITIONER THE LAST KNOWN ADDRESS OF A KNOWN AND IDENTIFIED GOVERNMENT INFORMANT WHO WAS NOT IN PROTECTIVE CUSTODY AND WHO WAS AN ALLEGED CO-PARTICIPANT IN THE CRIMES CHARGED.

The refusal of the trial court, sanctioned by the Court of Appeals, to direct that the last known address of the informant Mercier be provided to the Petitioner, was a decision in conflict with the applicable decision of this Honorable Court in Roviaro v. United States, 353 U.S. 53 (1957) and in conflict with decisions of the Fifth Circuit Court of Appeals in similar cases. (See, United States v. Godkins, 527 F.2d 1321 (5th Cir. 1976), discussed infra.).

The Petitioner respectfully submits that Roviaro, supra, directs that

Mercier's address should have been provided to the defense.[1] Unlike Roviaro, the identity of the informant in the instant case was known to the Petitioner. It was only his location which was unknown. If Roviaro requires disclosure of identity, how much more does it require disclosure of the address of an already-known individual?

A similar issue was decided in favor of a defendant in United States v. Godkins, 527 F.2d 1321 (5th Cir. 1976) wherein the Court held it to be reversible error for the trial court to

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1. Of course, had the Petitioner or his counsel been allowed to participate in the ex parte in camera conference, an acceptable alternative might have been arrived at which would have required the United States to produce Mercier without having to reveal his current address at all.

deny the defendant's motion to call a government informant as a witness at trial. The Court, basing its decision on the teachings of Roviaro, found that the denial deprived the defendant of his right to call witnesses in his behalf and have compulsory process and held:

> We have found no case which authorizes a trial court to restrict the right of an accused person to subpoena any witness already known by him to give relevant testimony simply because by questioning such witness may be uncovered as an informer.

(527 F.2d at 1326).

In the instant case, the denial of the information sought - Mercier's address - had the same effect - it restricted the right of the Petitioner to subpoena a witness, already known to him, to present relevant testimony.

It is therefore respectfully submitted that the Petition should be granted and a Writ of Certiorari issue.

III. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A WARRANT FROM A DUFFEL BAG IN WHICH THE PETITIONER HAD A LEGITIMATE EXPECTATION OF PRIVACY.

The duffel bag in question, containing the weapons used as evidence to convict the Petitioner on Count II of the indictment (carrying firearms in the course of a conspiracy), was seized from the Ford Econoline van stolen from German Motors, Inc., and searched without a warrant. Although German Motors authorized the FBI to search the two stolen vehicles, the FBI did not obtain consent from German Motors, or from any of the arrested individuals, including Petitioner, to search the duffel bag found inside the

van. Nor was a warrant obtained prior to the search of the duffel bag.

In refusing to suppress the contents of the duffel bag, the lower court was in conflict with the decisions of this Honorable Court in Arkansas v. Sanders, 442 U.S. 753 (1979) and Chadwick v. United States, 433 U.S. 1 (1977).

Notwithstanding the fact that the situs of the search - a van - was a stolen vehicle, the Petitioner nonetheless had a legitimate expectation of privacy in a closed duffel bag located therein. Since the Petitioner and his colleagues had already been arrested and removed from the area, and further, since there were no other exigent circumstances requiring an immediate search, the agents should have first obtained a warrant before opening the

duffel bag.

The Third Circuit's decision, finding that it was not necessary for the police to obtain a warrant prior to the search of the duffel bag, is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in United States v. Benson, ____F.2d____, (8th Cir. 1980), 28 Criminal Law Reporter 2063 (October 15, 1980).

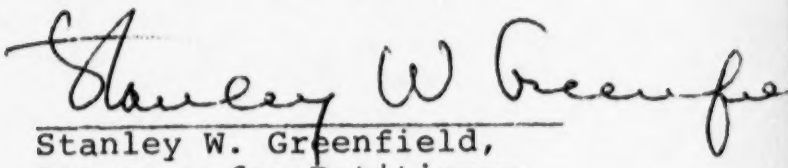
Since the lower court's ruling conflicts with the established principal enunciated by this Honorable Court on this point, and is in conflict with the above cited decision of the Eighth Circuit, it is respectfully submitted that this Petition should be granted.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

GREENFIELD & MURTAGH



Stanley W. Greenfield,
Attorney for Petitioner

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 1980, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS UNITED STATES MAIL, POSTAGE PREPAID:

1. Wade H. McCree, Jr.
SOLICITOR GENERAL
United States Department
of Justice
Washington, D.C. 20530

2. Paul J. Brysh, Esquire
Assistant United States
Attorney
Western District of Pennsyl-
vania
633 U. S. Post Office and
Courthouse
Seventh and Grant Street
Pittsburgh, Pennsylvania 15219

GREENFIELD & MURTAGH

Stanley W. Greenfield,
Attorney for Petitioner

SWORN to and subscribed before

me this 7th day of November, 1980

Notary Public

My Commission Expires:

JANE C. DINDINGER, Notary Public
Pittsburgh, Allegheny County, PA.
My Commission Expires June 7, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2834

UNITED STATES OF AMERICA

vs.

Howard Gregory BLUM
James Donald ECKMAN
Peter J. MACHI
Aedan Charles McCARTHY

James Donald Eckman,
Appellant

Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Crim. No. 79-00138-02

Submitted Under Third Circuit Rule 12(6)
August 4, 1980
Before: ALDISERT and SLOVITER, Circuit Judges, and HANNUM, District Judge.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that

* Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

(1) the trial court erred: (a) by denying appellant and his counsel the right to be present or make argument at an ex parte, in camera presentation by the prosecution of reasons why an informant's last known address should not be provided to the defense; and (b) by refusing to order the prosecution to disclose the last known address of an informant who was not in protective custody and who allegedly participated with appellant in overt acts in furtherance of the conspiracy with which he was charged; (2) the trial court erred in charging that legal withdrawal was impossible once there was the commission of an overt act following a conspiracy agreement; and (3) the trial court erred in denying appellant's motion to suppress weapons found in a duffel bag after his arrest;

it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Aldisert
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Aug. 4 1980

Certified as a true copy and issued in lieu of a formal mandate on September 18, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals
for the Third Circuit

United States Court of Appeals
FOR THE THIRD CIRCUIT
No. 79-2834

UNITED STATES OF AMERICA
vs.
HOWARD GREGORY BLUM, et al;
JAMES DONALD ECKMAN, Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and
ALDISERT, ADAMS, GIBBONS,
ROSENN, HUNTER, WEIS, GARTH,
HIGGENBOTHAM and SLOVITER,
Circuit Judges, and HANNUM,
District Judge.*

The petition for rehearing filed by
Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

* Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: September 10, 1980

No. 80-740

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES DONALD ECKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSTION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-740

JAMES DONALD ECKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, along with co-defendants Howard Blum and Peter Machi, was convicted by a jury in the United States District Court for the Western District of Pennsylvania of conspiracy to rob an armored car carrying bank funds, in violation of 18 U.S.C. 371 and 2113(b), and of unlawfully carrying firearms in the course of the conspiracy, in violation of 18 U.S.C. 924(c). He was sentenced to a total term of eight years' imprisonment. The court of appeals affirmed (Pet. App. 1a-3a).

Petitioner contends (Pet. 24-34) that the district court erred in refusing to suppress guns discovered during a warrantless search of a duffle bag found in a stolen vehicle seized by the FBI, in conducting an *in camera* proceeding relating to disclosure of the address of an informant, and in concluding that the government should not be required to disclose the address. These claims are without merit for the

reasons stated in our Brief in Opposition to co-defendants Blum's and Machi's petitions for a writ of certiorari (Nos. 80-5484 and 80-5491).[1]

In addition to those authorities relied on by Blum and Machi, petitioner contends that the court of appeals' decision conflicts with *United States* v. *Godkins*, 527 F. 2d 1321 (5th Cir. 1976) (Pet. 28-29), and with *United States* v. *Benson*, No. 80-1044 (8th Cir. Sept. 18, 1980) (Pet. 34). These cases, however, are inapposite here. In *Godkins*, the court ruled that the trial court had erred in prohibiting the defense from subpoenaing a witness to testify at trial because the defendant's Sixth Amendment right to call witnesses in his own behalf was violated. The court did not suggest that the government was required to assist in producing the witness at trial, as is the claim here. Indeed, the court drew a sharp distinction between denying information to the defendant that would enable him to subpoena a witness, which does not violate the Sixth Amendment, and denying the defendant the right to subpoena a witness based on information already known to him. 527 F. 2d at 1326. Moreover, the need for the informant's testimony was much greater than here because the defendant in *Godkins* was asserting an entrapment defense. In *Benson*, the bag in question had not been seized from a stolen car; thus, unlike here, the defendant retained a legitimate expectation of privacy in the bag.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

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[1]A copy of that filing has been sent to petitioner.

DOJ-1980-12